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No. 96-1762

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WASHINGTON RESTAURANT MANAGEMENT, INC.,
Petitioner,
vs.
THE VONS COMPANIES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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A. Burger King is not dispositive on the facts of this case

Respondent devotes considerable space and effort to convincing this Court of a proposition which is not at issue: that

the relationship between petitioner WRMI, the franchisee, and Foodmaker, the franchiser, is similar to the franchisee/ franchiser relationship which existed in Burger King v. Rudzewicz 471 U.S. 462 (1985) and that this relationship is sufficient to establish the "purposeful availment" prong of the minimum contacts analysis with respect to WRMI's contractual relationship with Foodmaker. (R.O.,13-16)[1] However, the key factors which distinguish this case from Burger King are that this is not an action between WRMI and Foodmaker nor is it an action on the contract with Foodmaker.

It is undisputed in this action that WRMI's contacts with California were insufficient to subject it to general jurisdiction in that State. (Pet. 9a) It is further beyond dispute that purposeful availment alone is not sufficient to establish specific jurisdiction. As this Court recognized in Helicopteros Nacionales de Colombia, S.A. v. Hall 466 U.S. 408 at 414, n. 8, (1984), specific jurisdiction is jurisdiction over the defendant in a suit arising out of or related to the defendant's contacts with the forum.

Thus, even assuming, arguendo, that WRMI's contacts with California were sufficient to establish that WRMI "purposefully availed itself" of the benefits and protections of California with respect to its contractual relationship with Foodmaker, this does not establish that the current claim by Vons, who is not a party to the WRMI/Foodmaker contract, who admittedly has no contractual or business relationship with WRMI, whose claim does not arise out of an alleged breach of the Foodmaker contract and whose claim does arise out of allegedly tortious conduct which took place entirely outside of California,"arises out of or is related to" WRMI's limited forum contacts. It is this relatedness prong, not the purposeful

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[1] "R.O." refers to Respondent's Opposition.

availment prong, which is at the heart of this dispute.

Respondent attempts to circumvent the separate relatedness requirement by materially mischaracterizing the decision of the California Supreme Court in this action as holding that "it is the relationship between the defendant and the forum, and not the relationship between the defendant and the plaintiff, that controls the personal jurisdiction issue." [emph. in original] (R.O. 16) In fact, this is not at all what the California Supreme Court said. What it did say was that "[t]he United States Supreme Court has stated more than once that the nexus required to establish specific jurisdiction is between the defendant, *the forum*, and the litigation." [citing Helicopteros, supra, 466 U.S. at p. 411, Shaffer v. Heitner 433 U.S. 186, 204] (1977), (Pet. 27a.)[italics in original; underlining added.] Thus, contrary to Respondent's veiled suggestion that purposeful availment (the relationship between the defendant and the forum) alone is sufficient to establish jurisdiction, in fact, the California Supreme Court and this Court agree that there is an additional requirement that there must also be a nexus between the defendant's forum contacts and the litigation (ie, the claim).

In other words, it is not enough that defendant has purposefully availed himself, in some context, to the forum. In order for specific jurisdiction to be established, there must also be a sufficient nexus between defendant's relationship with the forum and the claim itself. The claim must "arise out of or relate to" defendant's forum contacts. It is the nature of this nexus that is at issue here, and the application of this standard that has created the splits between and among the lower courts which can and should be resolved by the granting of this Petition.

B. Petitioner has not overstated the extent of the conflict among the lower courts regarding the relatedness standard

While not denying that there is a conflict between the lower courts regarding application of the relatedness standard in minimum contacts analysis, Vons argues that review of this issue is not necessary because petitioner "overstates" the extent of that conflict, claiming that since this Court's decision in Carnival Cruise Lines, Inc. v. Shute 498 U.S. 807-808 (1990), the lower courts have somehow moved closer to resolution of this issue. (R.O, 17-18) With all due respect, the contention simply does not stand up to scrutiny.

First, as Vons acknowledges, this Court did not even reach the personal jurisdiction issue in Shute. (R.O. 18) On this basis alone it is difficult to understand how this Court's decision in Shute, which expressly declines to consider the jurisdiction issue, could have any impact, and much less be binding authority, on the lower courts' analysis of the relatedness standard.

Next Vons contends that in Nowak v. Tak How Investments, Ltd. 94 F.3d 708, 716 (1st Cir., 1996), the proximate cause standard "has been all but abandoned by the First Circuit." (R.O. 19) This contention is patently wrong. In its August 1996 Nowak decision, the First Circuit engaged in a detailed discussion of the various relatedness standards applied by various courts, acknowledging that most courts "have gravitated toward one of two familiar tort concepts--'but for' or 'proximate cause.' After carefully analyzing the variations on these standards adopted by the federal circuits, the First Circuit concluded by reaffirming its adherence to the proximate cause standard, subject to very narrow exceptions. Directly contrary to Vons' assertion, (R.O., 19) the Nowak court did not "reject the argument that a line of First Circuit cases . . .

established 'proximate cause' as the applicable federal standard" (R.O. 19) nor did it conclude that these cases rested on a state long-arm statute and that a proximate cause analysis was not appropriate in the constitutional context. Quite to the contrary.

Specifically the Nowak court acknowledged the decision of the Supreme Judicial Court of Massachusetts in Tatro v. Manor Care, Inc. 416 Mass. 763, 625 N.E.2d 549, 551 (Mass. 1994) which rejected the First Circuit's proximate cause test insofar as it deals with the construction of the Massachusetts long arm statute, opting instead to utilize the broader "but for" standard. Notwithstanding the demise of the proximate cause analysis in connection with the Massachusetts statute, however, the Nowak court concluded that with respect to constitutional principles, the proximate cause analysis is the most appropriate standard. The court explained:

> We think the attraction of proximate cause is two-fold. First, proximate or legal cause clearly distinguishes between foreseeable and unforeseeable risks of harm. [citations omitted.] . . . adherence to a proximate cause standard is likely to enable defendants better to anticipate which conduct might subject them to a state's jurisdiction than a more tenuous link in that chain of causation. . . . [W]e think the proximate cause standard better comports with the relatedness inquiry because it so easily correlates to foreseeability, a significant component of the jurisdictional inquiry. (Nowak, supra, 94 F.3d at 715)

The First Circuit went on not only to emphasize the importance of proximate causation, but also to acknowledge that in certain limited circumstances, a "slight loosening" of this standard might apply. (Id., 716) The court stressed that its

acknowledgment that in certain limited circumstances some small amount of flexibility might be appropriate is to be recognized as a "narrow exception to the proximate cause test" (Id., p. 716) which represents only "a small overlay of 'but for' on 'proximate cause.'" (Id., p. 716) Thus, far from "abandoning" the proximate cause test, the Nowak court expressly reaffirmed its general adherence to that standard, albeit while recognizing a very limited exception.

Vons cites Agency Rent A Car System, Inc. v. Grand Rent A Car Corp. 98 F.3d 25 (2nd Cir., 1996) and Bell Paper Box, Inc. v. U.S. Kids, Inc. 22 F.3d 816 (8th Cir., 1984) for the proposition that the Second and Eighth Circuits no longer adhere to the proximate cause standard. Neither case supports this proposition. Agency, like Burger King, involved alleged breaches of contracts and the action was between the parties to the contracts. Although defendants resided out of state, it was clear that their businesses arose out of an ongoing contractual relationship with an in-state company and that the defendants communicated with the in-state headquarters and accessed in-state services on an almost daily basis. Clearly the causes of action for breach arose directly out of their extensive relationships with the forum state. Therefore, in Agency, as in Burger King, the court engaged in almost no analysis of the "relatedness" prong other than to acknowledge that it had been easily met.

Similarly, in Bell Paper the dispute involved an alleged breach of contract between the parties to a contract where the subject matter of the dispute occurred entirely within the forum state. Again, because the close relationship between the claim and defendant's contacts with the forum was obvious, the court engaged in virtually no discussion of the relatedness prong of the jurisdictional analysis. Thus, contrary to Vons' assertion, Bell Paper does not signal a "move toward a relational standard," it merely acknowledges, without analysis, the fact

that specific jurisdiction is premised on the relationship between the cause of action and defendant's contacts with the forum. This proposition is not in dispute. The same analysis applies to Wessels, Arnold & Henderson v. National Medical Waste, Inc. 65 F.3d 1427 (8th Cir., 1995), another breach of contract action.

Vons acknowledges that the Ninth Circuit continues to apply and advocate the 'but-for' test, but asserts that the Ninth Circuit has "qualified" this standard by noting in Doe v. American National Red Cross 112 F.3d 1048 (9th Cir., 1997) that a defendant may defeat jurisdiction which is "unreasonable" even where the purposeful availment and relatedness prongs are met. (R.O. 22) In fact, Doe did not qualify or modify the Ninth Circuit's minimum contacts analysis. Rather, it reiterated that Circuit's adherence to the but-for relatedness standard and repeated the standard tri-partite test for establishing specific jurisdiction: (1) purposeful availment of the privilege of conducting activities in the forum; (2) the claim must arise out of or result from defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. (Id., p. 1051) These are the same factors which the courts have traditionally applied and their repetition in Doe represents no change from the Ninth Circuit's previous position. (See, for example, Omeluk v. Langsten Slip & Batbyggeri A/S 52 F.3d 267, 270 (9th Cir., 1995); see also Fireman's Fund Insurance Company v. National Bank of Cooperatives 103 F.3d 888 (9th Cir., 1996).

Thus, it is plainly apparent that the state and federal appeals courts continue to be divided over the proper application of the relatedness standard and Vons' assertions notwithstanding, there has been no significant settling of this question in the lower courts since the Shute decision. In this regard, it is noteworthy that Vons has utterly failed to address the many recent law review articles and scholarly commentaries, a number of which are cited in the Petition, identifying the

continued confusion and lack of cohesion in the lower courts and expressly bemoaning the lack of Supreme Court guidance on this important due process issue.

C. The legal question that petitioner poses is at issue in this case

Vons' suggestion that this case does not squarely present the relatedness issue is without merit. The California Supreme Court devoted thirty-six pages of its opinion to a discussion of the relatedness standard and the various ways it has been applied by the appellate courts. (Pet. 17a-53a.) In concluding that a "substantial nexus" test is the proper standard for assessing relatedness, the Supreme Court expressly rejected no less than three other standards which have been applied by various courts (Pet. 52a-53a) In reaching this conclusion, the California Supreme Court also was compelled to specifically disapprove two California cases upon which the Court of Appeal had relied in concluding that Vons' claims were not sufficiently related to defendant's forum contacts so as to establish specific jurisdiction. (Pet. 31a-32a)[2] Indeed, the opening paragraph of the California Supreme Court's decision summarizes its holding as follows:

> We conclude that the franchisees had sufficient contacts with California through their relationship with their California franchiser, and that the tort claims alleged against the franchisees . . . were sufficiently related to the franchisees' contact in California to justify this

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[2] Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal.App.3d 546 (Circus Circus) and Sklar v. Princess Properties International, Ltd. (1987) 194 Cal.App.3d 1202 (Sklar)

state's exercise of jurisdiction over the franchisees. (Pet. 1a)

Obviously this case has everything to do with the relatedness standard and review of this case provides the perfect vehicle for this Court to resolve the long-standing confusion in this fundamental area of the law.

Respectfully submitted,

Dated: July 3, 1997

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